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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 332

J. B. EDWARDS, SECRETARY-TREASURER RELIANCE CLAY PRODUCTS COMPANY, INDIVIDUALLY, AND RELIANCE CLAY PRODUCTS COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 49-50) is reported at 189 F. 2d 970. The opinion of the United States District Court for the Northern District of Texas, contained in the preamble to its order (R. 38), is unreported.

JURISDICTION

The judgment of the court below was entered on June 30, 1951 (R. 50). The petition for a writ of certiorari was filed on September 17, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Board may assign to its regional directors the ministerial function of issuing subpoenas.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 13-14.

STATEMENT

On May 5, 1950, pursuant to Section 10 of the Act, a complaint was issued alleging that Reliance Clay Products Company had engaged in unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act (R. 11-14). On May 23, 1950, a hearing upon the complaint was begun before a trial examiner of the Board, and the hearing was completed except for the taking of evidence to ascertain whether the operations of the Company affect commerce (R. 6, 31).

Prior to the hearing the Regional Director for the Sixteenth Region of the Board granted a subpoena duces tecum requiring J. B. Edwards, as

secretary-treasurer of the Company, to produce at the hearing specified data pertaining to the Company's commerce (R. 5, 17-19). The subpoena was granted pursuant to the general procedure followed by the Board (R. 20). By this procedure, the Regional Office is supplied by the Washington Office of the Board with blank subpoena forms bearing the seal of the Board and a stamped signature of a member (R. 20). Upon application for a subpoena by a party to a proceeding, the Regional Director, after inserting on the form the name of the person to be served with the subpoena, delivers the form to the applicant who is then responsible for filling in the remainder of the subpoena and for its service (R. 20). In this case, upon application made by counsel for the General Counsel of the Board, the Regional Director on May 16, 1950, authorized issuance of the subpoena which was served on May 18, 1950 (R. 21).

After its service, the Company filed with the trial examiner a petition to revoke the subpoena, claiming in substance that the Regional Director was without authority to issue it and that it was too broad in scope (R. 21-26). The examiner ruled that the subpoena was validly issued, but he narrowed the breadth of the data to be produced, and as so modified he directed compliance with the subpoena (R. 26-30).

Upon refusal to obey the subpoena, the Board filed an application with the United States Dis-

trict Court for the Northern District of Texas for an order requiring obedience to the subpoena (R. 1). The District Court held that the subpoena was validly issued, and after further narrowing its scope, it ordered compliance with it (R. 38-40). Upon appeal, the court below affirmed the District Court, holding that the "Court did not err in directing obedience to the subpoena duces tecum against the contention that it was invalid because, in the circumstances, its issuance constituted an unlawful delegation of power by the National Labor Relations Board to the Regional Director. *National Labor Relations Board* v. *John S. Barnes Corp.*,178 F. 2d 156" (R. 49-50).

ARGUMENT

Section 11 (1) of the Act (Appendix, pp. 13-14, *infra*) provides that "The Board, or any member thereof," shall issue a subpoena upon application of any party to a proceeding under section 10 of the Act. Section 6 of the Board's Rules and Regulations (13 Fed. Reg. 3091, 6266), in effect at the times pertinent to this proceeding, provides in part that:

> *Regional Directors; their delegations of authority.* Under the general supervision and direction of the General Counsel the Regional Directors have the following authority:
>
> * * * * *
>
> (e) *To grant applications for subpenas,* to receive and rule upon or refer to the hearing

> officer or the Board motions to revoke subpenas in representation cases; to receive and refer to the Trial Examiner or the Board motions to revoke subpenas in complaint cases; * * *. [Italics in subsection (e) supplied.]

Thus, by its rules the Board has conferred upon its regional directors the authority to grant subpoenas upon application. Sustained by the court below, in conformity with the thorough opinion of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, the assignment of this function to regional directors is plainly within the statutory authority of the Board and presents no substantial question warranting review.

1. The exercise of the Board's subpoena power is divided into two steps. The first step deals with the grant of the subpoena, and the second step—not here involved—deals with the revocation of the subpoena.

"Upon application of any party" to the proceeding, it is mandatory upon "the Board, or any member thereof," to grant subpoenas "forthwith." The language of Section 11 (1) and its legislative history make plain that the subpoena must be granted "as a matter of course on the request of any party" (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 58; 93 Cong. Rec. 6445). The first step is therefore purely ministerial.

The second step brings into play the Board's discretion. A person who is required to produce

evidence in response to a subpoena may within five days after its service "petition the Board to revoke" the subpoena, and the Board is required to revoke it if the data demanded is not relevant or adequately described. Again it is clear from the language of Section 11 (1) and its legislative history that this "procedure for obtaining a subpena" does not dispense "with the requirements of materiality and relevancy." Those questions are merely deferred for ruling "on a motion to quash if the evidence required is not relevant or not described with sufficient particularity" (93 Cong. Rec. 6860).

Before the amendment of the Act in 1947, the Board's subpoena power was defined by Section 11 (1) in the following terms:

> * * * Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. [49 Stat. 455-456, 29 U. S. C. 161 (1).]

The primary reason which led Congress to change the Board's procedure was to require the grant of the subpoena without any preliminary inquiry into the relevance or the scope of the data requested. *National Labor Relations Board* v. *International Typographical Union,* 76 F. Supp. 895, 897 (S. D. N. Y.).

Accordingly, it is plain that the grant of the subpoena is a ministerial act entailing no exercise of discretion. *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 160. Since a subpoena must be granted forthwith upon request, and preliminary inquiry into its propriety before issuance is barred, the function performed by a regional director in granting a subpoena is little more than the physical act of delivering a document. The transfer of such a function presents no question of the propriety of a delegation of authority from an agency head to a subordinate official. A problem of delegation exists only where the subordinate official is authorized to perform a discretionary act involving the exercise of independent judgment. Since no act of discretion is embraced in the grant of a Board subpoena, the Board does no more than to utilize its regional directors as its arms in the performance of a ministerial act. The Act obviously contemplates that the Board may designate others to perform acts of this character on its behalf. *National Labor Relations Board* v. *John S. Barnes Corp., supra.*

2. There is no conflict between the decision below and this Court's decision in *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357.

a. In *Cudahy,* where the Administrator under the Fair Labor Standards Act was held not to be authorized to delegate his power to issue subpoenas to subordinates, the act of issuance embraced the

discretionary function of determining the propriety of the subpoena before its grant was effected. Under the National Labor Relations Act, however, the act of issuing a subpoena is a ministerial function entailing no element of discretion. There is nothing in *Cudahy* to suggest that where the issuance of the subpoena is ministerial, its delegation may not be effected. *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 161.

b. Section 6 of the Act (Appendix, p. 13, *infra*) vests the Board with broad rule-making power authorizing it to adopt "such rules and regulations as may be necessary to carry out the provisions of this Act." As explained by this Court in *Fleming* v. *Mohawk Wrecking & Lumber Co.,* 331 U. S. 111, 121, in upholding the authority of the Administrator under the Emergency Price Control Act to delegate his subpoena power to subordinates, "Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld." In *Cudahy,* however, the Administrator had neither rule-making power nor adjudicating power, his subpoena authority being incident only to a power of investigation. Thus, the administrative scheme under the National Labor Relations Act is wholly unlike that involved in *Cudahy. National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 161-162.

c. Section 5 of the Act (Appendix, p. 13, *infra*) states that "The Board may, by one or more of its members *or by such agent or agencies as it may designate,* prosecute any inquiry necessary to its functions in any part of the United States." (Emphasis supplied.) By this provision, authority to grant subpoenas may be delegated to regional directors, since to use subpoena power is preeminently to "prosecute" an "inquiry necessary to" the Board's "functions" for the exercise of which the Board "may designate" agents. *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 159; see also *Evans* v. *International Typographical Union,* 76 F. Supp. 881, 887 (S. D. Ind.). No comparable provision existed in *Cudahy. National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 161-162. And unlike *Cudahy,* since by this provision the authority to delegate is specifically granted as an incident to the prosecution of inquiries, there does exist a "legislative guide for determining which [functions] may and which may not be delegated" (315 U. S., at 361). See also, *Evans* v. *International Typographical Union,* 76 F. Supp. 881, 889 (S. D. Ind.).

d. In *Cudahy,* this Court reserved decision on whether, as here, the issuance of the subpoena, but not its signing, may be delegated. Discussing the practice of several agencies, including the Board, this Court observed that (315 U. S., at 365, n. 8): "Apparently the actual issuance of subpoenas,

though not their signing, is delegated to subordinates in some of these agencies. *We are not concerned here with the validity of such a practice, since both the signing and issuance of subpoenas is delegated by the Administrator."* (Emphasis supplied.)

This practice of the Board was well known to Congress, for it had been reported to it by the Attorney General's Committee on Administrative Procedure as early as 1941,[1] and it was likewise recorded in the Board's Rules and Regulations which throughout the administration of the Act, before and since amendment, openly and consistently authorized the regional directors of the Board to grant subpoenas.[2] When Congress by amending Section 11 (1) of the Act changed the Board's subpoena procedure, Congress subjected its administration to close scrutiny (*supra,* pp. 5-6). At no point did it intimate any criticism of the Board's practice of entrusting its regional directors with the authority to share in the exercise of subpoena power, and it used no language which would disallow continuance by the Board of its preexisting practice in this regard. "Failure of the Congress, under these circumstances, to expressly forbid the delegation of subpoena power when

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[1] Atty. Gen. Comm. Ad. Proc., NLRB, S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., 18-19; Final Report, Atty. Gen. Comm. Ad. Proc., S. Doc. No. 8, 77th Cong., 1st Sess., 423.

[2] Section 6(e), quoted *supra* at page 4, or a version similar in effect to it, has appeared in the Board's Rules since 1939, when the first rules were adopted.

amending Section 11 (1), must be considered as legislative ratification of the Board's construction and procedure." *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 161. See also, *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U.S. 361, 365-366.

e. Section 11 (1) of the Act requires that subpoenas shall be issued "forthwith" upon application. If each application for a subpoena were required to be referred to a member of the Board at Washington for his personal action, and if "the proceedings were being held on the West coast or at any other far distant point, the expression 'forthwith' would lose all significance." *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 160. Furthermore, to facilitate effectuation of its manifold program, the National Labor Relations Act "should be construed so as to give it the administrative flexibility necessary for prompt and expeditious action on a multitude of fronts." *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 162; cf. *Fleming* v. *Mohawk Wrecking & Lumber Co.,* 331 U. S. 111, 122.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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OCTOBER, 1951.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141 *et seq.*), are as follows:

* * * * *

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

"INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examina-

tion, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

* * * * *

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